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No. 06-1123

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In The

Supreme Court of the United States

ANIMAS VALLEY SAND AND GRAVEL, INC.,

Petitioner,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF LA PLATA, COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals of Colorado

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a zoning regulation that frustrates a landowner's reasonable investment-backed expectations and diminishes the value of his property by 70.6 percent effect a compensable regulatory takings?[1]

[1] Respondents have reframed the question presented because whether the zoning regulation was "enacted primarily for aesthetic purposes and not to prevent some important public harm or injury" was not a finding or conclusion drawn by the trial court and is solely the opinion of the Petitioner and therefore, improperly set forth in the question presented.

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OPINIONS BELOW

The Colorado Court of Appeals affirmed the judgment of the District Court of La Plata County, Colorado, Case No. 04CA2437 in an unpublished opinion announced on April 6, 2006 holding that the trial court's findings and conclusions are consistent with the analysis prescribed in *Animas Valley Sand & Gravel Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001) and that "[we] cannot conclude that the trial court was required to find, based on these or any additional factors cited by Plaintiff, that this case fell into the 'rare category' of cases in which the land retains value but the totality of the circumstances nevertheless evidences a taking." Appendix p. 8a to Petition for Writ of Certiorari. The Colorado Supreme Court denied Petitioner's Petition for Writ of Certiorari on November 13, 2006. Appendix p. 1a to Petition for Writ of Certiorari.

JURISDICTION

The Petitioner misstates the invocation of jurisdiction as deriving from 28 U.S.C. §1254(1) since this case has not been in the Federal Court of Appeals. In any event, jurisdiction may be derived through application of 28 U.S.C. §1257.

STATUTES OR OTHER PROVISIONS INVOLVED

The Federal Takings Clause provides "nor shall private property be taken for public use without just compensation." U.S. Constitution, Amendment V. This provision is applicable to the States through Amendment XIV

to the United States Constitution. *Chicago, B. and Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

STATEMENT OF THE CASE

In 1996, the Petitioner, Animas Valley Sand & Gravel, Inc. (hereinafter "Petitioner" or "AVSG"), brought an inverse condemnation action against the Respondent, Board of County Commissioners of the County of La Plata, Colorado (hereinafter the "Respondent" or "County"). AVSG's claim is based upon the November 1993 adoption by the County of the Animas Valley Land Use Plan "a zoning land use plan" (hereinafter referred to as the "Plan"). The Plan designated just a portion of AVSG's land (33 out of 41 acres) as being within the river corridor district. Under the Plan, AVSG is prohibited from operating a sand and gravel mining operation only upon that portion of property designated as being within the river corridor district. The remaining eight (8) acres of AVSG's tract of land was designated as industrial district, since that was the portion of property upon which AVSG had a Colorado Mined Land Reclamation Act Permit to mine sand and gravel and, as such, AVSG was allowed to continue to operate a sand and gravel mining operation on that portion of its property pursuant to the Plan.

Pursuant to its Amended Complaint filed on January 6, 2003, AVSG argued that as a result of the river corridor designation on a portion of the subject property, a "taking" of its property had occurred in violation of Article II, §15 of

the Colorado Constitution and the Fifth Amendment to the United States Constitution.[2]

After the case was first tried in 1998 and the trial court ruled against AVSG finding that its property retained economic value, the Colorado Supreme Court, on Certiorari review, held that a compensable regulatory taking could occur even if the property subject to the regulation retained some economically viable use. *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of the County of La Plata, Colorado*, 38 P.3d 65 (Colo. 2001). The Colorado Supreme Court remanded the case back to the trial court with specific directions to conduct a prescribed fact-specific inquiry to determine whether a taking had occurred. *Id.* In particular, the Colorado Supreme Court set forth standards regarding the application of the second tier of analysis to the whole interest in property owned by AVSG. The Court stated that:

> [I]f AVSG is to prevail, it must show that it falls into the *rare* category of a landowner whose land

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[2] The court had previously conducted a two-day trial in 1998 solely on the issue whether a takings occurred under the Colorado Constitution. In that case, the trial court determined that the Plan did not effect a compensable taking. At that time, the trial court focused its inquiry only on that portion of property designated as river corridor. Still, the trial court determined that AVSG failed to prove that the Plan rendered the river corridor property economically useless, and therefore, did not effect a taking. Since then, the United States Supreme Court decided *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) which resolved any doubt that there is a two-tiered inquiry in a regulatory takings analysis such that if a landowner fails to meet its burden of proving a *per se* taking (whereby a regulation effectively denies all beneficial and economic use of property), the landowner may still prove a taking pursuant to a fact-specific inquiry. *Id.* at 617.

> has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation.

Id. at 67 (emphasis supplied). At the second trial in 2003, the trial court analyzed AVSG's takings claims using a number of factors including those prescribed by the Colorado Supreme Court and as set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). No taking was found. Upon review after the second trial, the Colorado Court of Appeals held that the proper inquiry was utilized and accomplished by the trial court in applying the prescribed analysis set forth by the Colorado Supreme Court in *Animas II*.[3]

Thereafter, AVSG was unsuccessful in its Petition for Writ of Certiorari filed in the Colorado Supreme Court. That Petition was denied *en banc* on April 6, 2006. Appendix p. 1a to Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE COLORADO COURT OF APPEALS HAS CORRECTLY AFFIRMED THE USE OF THE AD HOC FACTUAL-SPECIFIC INQUIRY TO A FEDERAL TAKINGS QUESTION.

By this Petition, AVSG is searching for a formulaic solution to the required *ad hoc* inquiry on regulatory

[3] *Animas II* refers to *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of the County of La Plata, Colorado*, 38 P.3d 65 (Colo. 2001).

takings claims,[4] arguing that a vacuum needs to be filled in takings jurisprudence. AVSG fails to provide the legal basis for establishing a bright-line pass/fail test for the takings analysis. In fact, precedent calls for the opposite approach to the takings inquiry.

Where regulation places limitations on property that fall short of eliminating all economically beneficial use, "a taking, nonetheless, may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Penn Central, supra*, at 124. The determination of a taking is "a question of degree – and therefore, cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Many of this Court's cases have emphasized this aspect of the takings analysis observing that the Court has been unable to develop any "set formula" to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, N.Y., 369 U.S. 590, 594 (1962). The takings analysis "calls as much for

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[4] In its search, AVSG asserts that "the primary purpose of the regulation was to promote a scenic corridor and not to prevent important public harm or injury," yet does not cite anything in the record for support, nor does the trial Court's Order set forth any such finding or draw such conclusion. See, Petitioner's Petition for Writ of Certiorari p. 9. Additionally, Petitioner opines that "sand and gravel production is an economically necessary and socially beneficial activity and one that the Plan actually allows to occur at 21 other locations within the Plan's area," however this statement is misleading and is not entirely supported by the record, in that, any sand and gravel operation (including 10 acres of AVSG's property) that was previously permitted by the State of Colorado within the Plan area at the time of the adoption of the Plan was allowed to continue under an industrial designation to the Plan map. Appendix p. 16a, number 8 to Petition for Writ of Certiorari.

the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). *Penn Central* itself stresses that there is no "set formula" for determining when a compensable regulatory taking has been effected, calling instead, on the need to conduct "ad hoc, factual inquiries." *Id.* at 124. See *U.S. v. Central Eureka Mining Company*, 357 U.S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case."); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (inquiry as to whether governmental action results in an unconstitutional taking does not lend itself to any set formula, but must arise from essentially an ad hoc and fact-intensive analysis of the circumstances.)

This Court has remained clear that in attempting to determine how far is "too far," that is, whether a regulation's impact gives rise to a taking, it "must remain cognizant that government regulation – by definition – involves the adjustment of rights for the public good," *Andrus v. Allard*, *supra*, at 65, and that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law," *Mahon, supra*, at 413; see *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). Justice Scalia, writing for the majority in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) acknowledged:

> [T]hat in at least some cases a landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and to the landowner whose property is reduced to 5% of its former value by the highway (who

> recovers nothing). Takings law is full of these "all-or-nothing" situations.

Lucas v. South Carolina Coastal Council, supra at 1019, fn8. Hence, a mere decrease in land value is not enough in a factual-specific regulatory takings inquiry; rather, the level of regulatory interference must be "very high." *Animas II, supra*, at 66.

This Court has grappled with the specific point at which diminution in property value will give rise to a compensable taking, however, it has declined to find a taking in cases where there was a significant reduction in a property's value, to wit: *Agins v. Tiburon*, 447 U.S. 285 (1980) (no taking with an 85% reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking with a 75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking with a 92.5% reduction in value).

This Court has often reiterated that takings' law "does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Palazollo v. Rhode Island, supra*, at 634. Although there is no judicially created regulatory takings bright-line test, this Court has historically held that the diminution in value attributable to the government's regulation must involve extreme circumstances before giving rise to a takings. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). To date, Petitioner has been unable to cite a case in which a taking was found where

the regulated property at issue still retained 30% of its pre-regulation value.[5]

Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Concrete Pipe & Products of California, Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602, 645 (1993). *Concrete Pipe* specifically cites the cases of *Village of Euclid, supra*, and *Hadacheck, supra*, with approval on the proposition that its previous decisions rejecting takings challenges to governmental restrictions leading to economic losses as high as 92.5% remain the law of the land.

In the case here, despite the Plan, AVSG's property retains a reasonable use as a home site and is saleable. Appendix p. 46a to Petition for Writ of Certiorari. The trial court in completing its ad hoc analysis found no taking. *Id.* The Colorado Court of Appeals appropriately held that the trial court's findings and conclusions are consistent with the analysis set forth in detail in *Animas II* as prescribed by the United States Supreme Court. Appendix. p. 6a to Petition for Writ of Certiorari.

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[5] Petitioner argues that *Agins*, *Euclid* and *Hadacheck* (which support an overwhelmingly large diminution in value before a taking can be found) are distinct since those cases were based primarily on substantive due process or equal protection theories and are not regulatory takings cases. Although the facts of each case may vary slightly with the facts here, it remains that each case weighs a regulation's effect upon the value of property, i.e., *Hadacheck, supra* (regulation prohibiting a brickyard in a residential area whereby the value of the land was $800,000.00 for entire tract when unzoned, and $60,000.00 as zoned.); *Village of Euclid, supra* (regulations prohibit industrial use resulting in a reduction in value from $10,000.00 per acre to $2,500.00 per acre); *Agins, supra* (city's open space, and land zoning ordinances restricted previously purchased 5-acre tract of land to 1 to 5 single-family residences and open-use).

II. THE COLORADO COURT OF APPEALS AFFIRMED AN IMPORTANT FEDERAL TAKINGS QUESTION WHICH DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

In an attempt to create additional circumstances apart from the economic factors analyzed by the trial court, AVSG has argued, for the first time in Colorado's appellate courts, against the character of the governmental action. AVSG had always conceded this point. At trial, AVSG's counsel stated:

> Animas Valley Sand and Gravel is not challenging the regulation of Animas Valley land use. We're accepting it. The County had the authority to zone his [sic] property. All we're saying is under the State and Federal Constitution, that it is fundamentally unfair to force Mr. Hanks, Animas Valley Sand and Gravel – and the purpose of that was to beautify or to make the corridor of the entrance to the North part of Durango and La Plata County attractive. We accept that, we accept that that's part of their authority to do so.
>
> . . .
>
> So we're not disputing at all their authority to pass a regulation, we're not saying the regulation is a bad idea, we're just saying okay, if you're going to do that, let's be fair about it. Let's spread the burden.

Trial record, Vol. X at p. 19 ln. 24-25; p. 20 ln. 1-9, 17-20.

The trial court and the Colorado Court of Appeals correctly found that AVSG had not previously raised issues concerning the character of the governmental action in adopting the Plan. Appendix p. 38a-39a and p. 8a to Petition for Writ of Certiorari. Assuming *arguendo* that

AVSG properly raised issues as to the character of the governmental action, there is no conflict with the decision in *Lingle v. Chevron U.S.A., Inc.*, *supra*. That case held that a formula used to inquire whether governmental regulation of private property "substantially advances" legitimate state interests was a due process inquiry, and is not an appropriate stand-alone test for determining whether regulation effects a Fifth Amendment taking. *Id.*, at 540.

Importantly, any reference to whether the Plan serves a legitimate governmental purpose was not solely utilized in the analysis, nor was it used to find a constitutional takings in this instance. The trial court appropriately analyzed Petitioner's takings claim utilizing the factors as set forth in *Penn Central, supra*. Significantly, the evidence in this case focused primarily on the economic impact and reasonable investment-backed expectation factors. Appendix p. 42a-43a to Petition for Writ of Certiorari. Moreover, since AVSG did not rely on the "substantially advances" test in support of its takings claim, nor did the trial court's Order hinge on this test, it is not clear what relevance the issue has here.

Assuming any relevance, for the reasons set forth in *Lingle, supra*, there is no need to disturb the holding in this case since the trial court ultimately found no taking. Appendix p. 46a to Petition for Writ of Certiorari. This Court's holding in *Lingle* is applicable here:

> We emphasize that our holding today – that the "substantially advances" formula is not a valid takings test – does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, see 447 U.S. at 261-262 (finding that the challenged zoning ordinances "substantially advance[d] legitimate governmental goals"), and arguably also in *Keystone*

> *Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485-492 (1987) (quoting: "'substantially advance[s]'" language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the "substantially advances" formula, the Court has merely assumed its validity in referring to it in dicta. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *Del Monte Dunes*, 526 U.S., at 704; *Lucas*, 505 U.S., at 1016; *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Lingle, *supra*, at 545. Similarly, since no taking was found subsequent to review based primarily upon the *Penn Central* inquiry and not the substantially advances formula, there is no need for any additional review here.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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